Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-220

DECEMBER TERM, 2007

Christine Grele	}	APPEALED FROM:
	}	
	}	
v.	}	Windham Family Court
	}	
	}	
Mitchell Estrin	}	DOCKET NO. 98-3-03 Wmdm
		Trial Judge: Karen R. Carroll

In the above-entitled cause, the Clerk will enter:

Mother appeals several family court orders, including orders addressing the parties' motions to clarify and modify a prior order concerning parental rights and responsibilities. We affirm.

The parties were married in Ohio in 1992 and divorced in Rhode Island in 1995 when their only child was four years old. The Rhode Island divorce order awarded the parties joint custody, including joint legal custody, of their daughter, who was born August 13, 1991. Since 1997, both parties have lived in Vermont in locations separated by approximately two hours. Mother has been the primary physical custodian, but father has significant parent-child contact. In response to father's previous motion to modify and enforce parental rights and responsibilities, the family court issued a February 27, 2004 order based on the parties' stipulation giving father parent-child contact every other weekend plus four additional weekends and time during holidays and summers.

As the result of conflicts between the parties over whether father would be entitled to make-up time when he consented to his daughter engaging in her own activities rather than visiting him as scheduled, father filed an April 24, 2007 motion to clarify the meaning of and enforce the following provision contained in the February 2004 order:

> If the father's parent-child contact is cancelled for reasons unrelated to him or his schedule, he shall be permitted to make up the parent-child contact he has lost at a time and date of his choice. If he misses parent-child contact due to reasons related to his own schedule, health, or other issues, he may automatically make up two of such missed contacts each year. The first such contact shall

> be rescheduled at a date and time he chooses, and the second shall be made up at a time and date to be chosen by the mother.

On May 3, before mother was served with father's motion or had an opportunity to respond, the family court issued two brief entry orders. The first order, among other things, clarified the provision cited above by ruling as follows: "If a visit is canceled, due to [the child's] schedule, whether [father] consents or not, he is entitled to make-up time." Regarding father's motion to enforce, the second order stated the court's belief that the first order resolved the parties' issues.

Apparently, father's attorney had attempted, with the assistance of the sheriff, to serve mother with his motion for clarification when she filed it with the court, but service was not, in fact, completed until May 8, when mother received a copy of father's motion and the court's two May 3 orders. On May 11, mother filed with the family court a response to father's motion. Mother informed the court that she had not seen father's motion before May 8 and thus had had no opportunity to respond. She asked the court "to consider the full facts in its decision on parental contact based on the following information to each point of [father's] . . . motion." She then proceeded to elaborate on several points in opposition to father's motion. Although she made specific requests at the end of motion, she did not request a hearing or ask the court to make findings on the motion. On the same day, mother filed a lengthy motion to modify and enforce parental rights and responsibilities, and also asked the court to appoint a guardian ad litem for the parties' child. On May 14, the family court denied mother's motions in four entry orders, three of which merely referred to the first order, which briefly addressed mother's opposition to father's motion as well as her motion to modify parental rights and responsibilities and parent-child contact. The court explicitly acknowledged mother's "exhaustive affidavit outlining her concerns," but nonetheless concluded that "there is no evidence that a real, substantial, and unanticipated change in circumstances exists."

Mother appeals the May 3 and 14 orders, first arguing that the family court erred by effectively modifying her parental rights and responsibilities without (1) providing her an opportunity to respond to father's motion, (2) making the requisite findings or holding a hearing, (3) finding changed circumstances, and (4) determining that modification was in the child's best interests. Taking these claims of procedural defects one at a time, we first reject mother's assertion that the court's May 3 order was effectively a modification order that required a finding of changed circumstances and consideration of the child's best interests. Plainly, father was not seeking to modify parental rights or responsibilities but rather was seeking to clarify and enforce specific language contained in the provision quoted above from the February 2004 order. Cf. Schwartz v. Haas, 169 Vt. 612, 614 (1999) (mem.) (rejecting wife's argument that the family court modified a previous maintenance award without finding changed circumstances, and instead concluding that the court sought to enforce the terms of the previous award rather than modify it).

Mother raises a legitimate concern, however, regarding the family court's issuance of the May 3 order before she was served with father's motion and had an opportunity to respond to it. Service upon the other party is required, of course, when the moving party is seeking modification or enforcement of a judgment concerning, among other things, parental rights and responsibilities. V.R.F.P. 4(j)(2)(B). Moreover, by rule, a court may dispose of a motion without argument if the nonmoving party fails to respond within fifteen days after service of the

motion. V.R.C.P. 78(b)(1); see V.R.F.P. 4(a)(1) (stating that rules of civil procedure apply to divorce actions except as otherwise provided). In this case, at the time the court ruled on father's motion to clarify and enforce, there had been no service on mother and so she could not respond. This was clear error, but without prejudice since the court ruled only on the clarification and not the enforcement request. Reiterating what the 2004 order expressly provided about making up for missed visitation, the court declined to issue any enforcement order against mother.

In any event, shortly after issuing its May 3 order, the trial court did consider mother's complete response to father's motion, together with her own motion to modify, filed five days later. See V.R.C.P. 61 (stating that courts "must disregard any error or defect in the proceeding which does not affect the substantial rights of parties"). In filing the motion, mother asked the court to consider her submissions but did not request findings or a hearing. See V.R.C.P. 52(a)(1) (providing that the court shall make findings if timely requested by a party); V.R.C.P. 78(b)(2) ("An opportunity to present evidence shall be provided, if requested, unless the court finds there to be no genuine issue as to any material fact."). On May 14, in denying mother's motion to modify parental rights and responsibilities and parent-child contact, the court plainly considered and rejected the points that mother raised in opposition to father's motion to clarify—points similar to those she reiterates in her brief on appeal.

Further, there is evidence in the record to support the family court's ruling on father's clarification motion, notwithstanding mother's reliance on comments made by the judge at the 2003 hearing and the alleged past practice of the parties. See Slade v. Slade, 2005 VT 39, ¶ 5, 178 Vt. 540 (holding that when findings are neither requested nor made, the question becomes whether, upon viewing the record most favorably to the prevailing party and keeping in mind the court's wide discretion, there is evidence to support the court's ruling). Assuming mother was correct that the parties had varied from the visitation specifics in the 2004 order, the order remained in effect in the event the parties failed to agree otherwise. In short, in the end, mother was afforded an opportunity to contest father's motion, and fails to demonstrate that the court erred in the content of its May 3 order or abused its discretion by not holding a hearing on mother's response.

Mother also challenges the family court's denial of her motion to modify parental rights and responsibilities. We conclude that the court acted within its wide discretion in determining that mother did not meet her heavy burden of demonstrating a real, substantial, and unanticipated change of circumstances resulting from either the court's clarification of the February 2004 order or the parties' continuing disagreements over the scheduling of parent-child contact. See Gates v. Gates, 168 Vt. 64, 67-68 (1998) (holding that the family court's determination concerning changed circumstances will be upheld absent a showing of an abuse of discretion, and noting that although a breakdown in communication may amount to changed circumstances, that may not be so when the parties have consistently had such problems). Assuming mother's allegations accurately described a less-than-cordial relationship with father and an inability to communicate, the parties' adherence to the visitation schedule should avoid most disagreements in that area. Assuming mother accurately describes the child's scheduling conflicts as she proceeds through her busy adolescent years, these types of issues are to be expected when a child's parents live separate and apart. Other issues raised by mother, such as father's transportation requests, his apparently unwelcome insistence on the child learning to drive, and his alleged refusal to engage in mediation are not the stuff of real, substantial and unanticipated change of circumstances

warranting reexamination of parental rights and responsibilities. Nor has mother demonstrated that the court abused its discretion by denying her motion to appoint a guardian at litem for the parties' child. Finally, we grant father's motion to strike part of mother's supplemental printed case, which was not material to our decision.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice